

PUBLIC WORKS & UTILITIES COMMITTEE

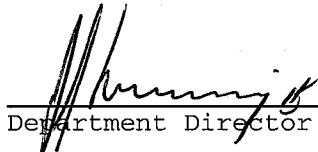
11-0335R

RESOLUTION AUTHORIZING AGREEMENT WITH MNSCU TO AUTHORIZE
CONSTRUCTION OF DRAINAGE IMPROVEMENTS ON CITY PROPERTY.

CITY PROPOSAL:


RESOLVED, that the proper city officials are hereby authorized to enter into an agreement, substantially in the form of that agreement on file in the office of the city clerk as Public Document No. _____, with the state of Minnesota, acting through its board of trustees of the Minnesota State Colleges and Universities, on behalf of Lake Superior College to authorize the college and its agents to construct and maintain improvements on city-owned property to handle surface water drainage from property owned by the state at no cost to the city.

Approved:



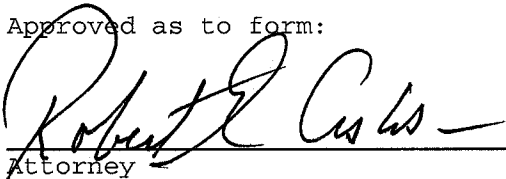
Department Director

Approved for presentation to council:




Chief Administrative Officer

Approved as to form:



Attorney

Approved:



Auditor

PW&U/ATTY REA:dma 06/15/2011

STATEMENT OF PURPOSE: The purpose of this resolution is to authorize an agreement with the State of Minnesota, acting through its Board of Trustees of the Minnesota State Colleges and Universities, on behalf of Lake Superior College ("MnSCU") to construct and maintain certain surface water drainage facilities on City-owned property to properly drain surface water which originates on College property.

The College is located on property on the west side of Trinity Road above its intersection with Arlington Avenue. The City owns property adjacent to and

downstream of the College which includes a drainage way which connects to Miller Creek. Surface water drainage is collected from the College's buildings and parking lots and is channeled into that drainage way.

For some time this drainage has been causing substantial erosion to the drainage way. The South St. Louis Soil and Water Conservation District, on behalf of the College has secured funding to allow it to construct, on behalf of the College, improvements to the City's property including storm sewer facilities, which will allow the water to be carried across City property and into Miller Creek in such a manner as to eliminate the erosion problem on City property and without causing damage to Miller Creek. The City Engineer has reviewed the plans for the project and has approved of them.

But in order to construct the project, the City's consent is required.

This Agreement is with MnSCU as they are the real party at interest and they will need to assume responsibility not only for the construction of the improvements but also their maintenance on an on-going basis. The Agreement authorizes the College and the District as their agent to construct the improvements according to the approved plans. It then requires that the College inspect the facilities at least bi-annually to make sure that they are functioning properly and are in good condition and also requires that they perform any maintenance necessary to insure that they function as designed.

SURFACE WATER DRAINAGE AGREEMENT LAKE SUPERIOR COLLEGE

THIS AGREEMENT is made by and between the CITY OF DULUTH, a municipal corporation created and existing under the laws of the State of Minnesota, hereinafter referred to as "City" and the STATE OF MINNESOTA, acting through its Board of Trustees of the Minnesota State Colleges and Universities, on behalf of Lake Superior College, hereinafter referred to as "MnSCU".

WHEREAS, MnSCU is the owner of certain property located in the City of Duluth lying northwest of the intersection of Trinity Road and Arlington Avenue upon which is located the campus of Lake Superior College which includes buildings and parking areas which accumulate surface water drainage water which drains onto the below-referenced property of City; and

WHEREAS, City is the owner of the hereinafter-described Property onto which the afore-referenced surface water is draining and which Property is being eroded and otherwise damaged by said drainage; and

WHEREAS, MnSCU is desirous of taking steps to mitigate or eliminate said erosion and damage to the Property as are hereinafter set forth; and

WHEREAS, City is desirous of facilitating this work by MnSCU and is willing to grant permission to MnSCU and its agents to enter onto the Property for that purpose.

NOW THEREFORE, in consideration of the mutual covenants and conditions hereinafter set forth, the parties hereto hereby agree as follows:

1. Definitions

For the purposes of this Agreement the following terms shall have the meanings hereinafter ascribed to them:

- A. District: shall mean the South St. Louis County Soil and Water Conservation District and its officers, agents, servants, employees and contractors and subcontractors thereof.
- B. Plans: shall mean the plans, drawings and specifications for the Project on file in the office of the City Engineer as City Project No. 0987ST and as such plans, drawings and specifications may be modified with the prior written approval of the City Engineer.
- C. Project: shall mean the design and construction of work on the Property which will eliminate or mitigate to a level acceptable to the Engineer the effects of the discharge of Water on the Property, all as described on the Plans.
- D. Property: shall mean that property located in St. Louis County, Minnesota more particularly described on Exhibit A attached hereto and made a part hereof.
- E. Water: shall mean all surface water or ground water at any time collected on property owned by MnSCU and which drains across the Property.

2. MnSCU and District-Relationship

MnSCU as the owner of the owner of the property upon which the Water is accumulating and from which the Water is draining across the Property and therefore is the party responsible for controlling and disposing of the Water in such a way as to not have a negative impact on the Property. District has knowledge and experience in the area of surface water drainage and the design and construction of facilities used to eliminate or mitigate the effects of such drainage and has also secured funding which it can is willing to make available to pay for the costs of mitigating the impact of the Water on the Property. For the purposes of this Agreement it is understood that District will be acting as the agent for MnSCU and will be acting on its behalf in so far as it performs any services for MnSCU or enters into any contracts related to design and construction of facilities intended to dispose of the Water.

3. Plans and Specifications

A. Plans Approved

District as agent for MnSCU has caused the Plans, as defined above, for the Project. Said Plans have been approved by the Engineer.

B. Changes in the Plans

In the event that MnSCU or District or any contractor acting on behalf of MnSCU or District wishes to make or makes any changes to the Plans or any deviations therefrom, prior to doing so, MnSCU shall cause revised plans to be drawn and written setting forth the exact modifications or deviations to be made from the Plans and, as appropriate setting forth the justification for the modifications. The drawings and written specifications for such modifications or deviations shall be subject to the approval of the Engineer in the exercise of his or her unfetter discretion. Upon approval by the Engineer of the drawings and written specifications for such modification or deviations, such revised drawings and written specifications shall be deemed to be the Plans for the purposes of this Agreement. No portion of the Project shall be constructed which is not in accordance with the most current Plans.

4. Construction

A. Construction of Project

Upon approval of the Plans, City grants to MnSCU and to its agents and contractors the right to enter upon the Property for the purpose of constructing the Project in accordance with the Plans. MnSCU agrees for itself and its agents and their contractors that they shall give the Engineer at least Ten (10) days notice prior to entering upon the Property for the purpose of constructing the Project. Upon approval of the Plans and within the time frames set forth in Subparagraph B. below, MnSCU shall cause the Project to be constructed on the Property in accordance with the Plans therefore.

B. Time for Construction

MnSCU agrees that construction of the Project shall commence no later than July 1, 2011 and shall be completed no later than September 1, 2011 except that, in the exercise of his or her sole discretion, the Engineer may extend the time for commencement or completion or both of construction for not to exceed sixty (60)

days.

C. Inspection and Reporting

MnSCU agrees that the Property and the work shall at all times be available to the Engineer and his or her representatives for inspection of the work and for testing of materials and workmanship. Furthermore, MnSCU will cause its agents and contractors to make available to the Engineer all test results of tests involving materials and methods pertaining to the Project. MnSCU further agrees that it will cause monthly reports on the progress of the work to be provided to the Engineer during the pendency of the Project. Upon completion of construction of the Project MnSCU will cause its agents and their contractors to jointly inspect the construction of the completed Project with the Engineer for conformance to the Plans.

D. Certification of Completion

Upon the determination by the Engineer that the Project has been completed in accordance with the Plans, the Engineer shall so certify in writing to MnSCU.

F. Costs of Construction

All costs of the Project including design and construction thereof and all other costs associated therewith shall be born exclusively by MnSCU and, as appropriate, its agents and no such costs shall be responsibility of or be paid by City.

5. Maintenance

A. Inspection

As a condition of this Agreement, on or before June 1, 2012 and every other year thereafter for the Term of this Agreement, MnSCU shall cause Project and the Property to be inspected by a civil engineer licensed by the State of Minnesota and having expertise in hydrological engineering to insure that the Project is properly maintained and is functioning in the intended manner. After each such inspection and no later than June 30 of each such year, MnSCU shall cause a copy of such inspection report to be transmitted to the City's MS-4 Stormwater Project Coordinator. Such report shall be subject to the approval of the Engineer in the exercise of his or her discretion. If such report is not approved, MnSCU shall cause such report to be revised to the reasoned satisfaction of the Engineer and, if necessary thereto, to cause the Project to be re-inspected.

B. Maintenance Work

As a further condition of this Agreement, MnSCU agrees that it shall cause the Project to be maintained in perpetuity in substantial accordance with the Plans and in a manner which ensures that it functions properly to control the impacts of the Water draining across the Property and shall pay all costs associated therewith except that in the event that, at any time, the Project is permanently no longer used to convey the Water or any significant part thereof over the Property, MnSCU's obligation to maintain the Project shall be terminated by City. Provided, however, in the event that the design of the Project should prove impractical to maintain or shall be damaged by acts of God in such a manner as to

make restoration not practically possible or in the event that MnSCU shall develop modifications or improvements to the Plans which will be at least as effective as the Plans in disposing of the Water and shall present practical advantages to MnSCU and City, MnSCU may request modification of the Plans. In the event that MnSCU so requests modification of the Plans, the Engineer shall review the Plans in the same manner as provided for in Subparagraph B of Paragraph 3 above and, if approved by the Engineer, such approved plans shall be thereafter the Plans for the Project. Provided further that in the event that MnSCU shall permanently divest itself of all of the land adjacent to the Property from which the Water is collected, MnSCU shall be entitled to transfer its maintenance obligations hereunder to the transferee of said land.

6. Term

The Term of this Agreement shall commence as of the date of the signing and shall be, thereafter, perpetual.

7. Provision Against Liens

Neither MnSCU nor its agents or contractors shall create or permit any mortgage, encumbrance or lien or allow any mechanics' or materialmen's liens to be filed or established or to remain against the Property, or any part thereof, provided that if MnSCU shall first notify the City of its intention to do so and post such security as the City reasonably deems necessary, the MnSCU may, in good faith, contest any such mechanics' or other liens filed or established as long as City doesn't deem its interest or rights in this Agreement to be subject to foreclosure by reason of such contest.

8. Indemnification

A. Generally

Subject to the limitations contained in Minnesota Statutes Section 3.376, MnSCU will to the fullest extent permitted by law, protect, indemnify and save the City and its officers, agents, servants, employees and any person who controls the City within the meaning of Securities Act of 1933, harmless from and against all liabilities, losses, damages, costs, expenses, including attorneys' fees and expenses, causes of action, suits, claims demands and judgements of any nature arising from:

1. Any injury to or death of any person growing out of or in connection with any and all acts or operations related to the construction, installation and maintenance of the Project. The foregoing indemnification shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefits payable by or for the MnSCU except as set forth above;
2. Any violation of any law, ordinance, court order or regulation affecting the Project or the design, construction or maintenance thereof.

B. Insurance

The parties hereto acknowledge that MnSCU is self-insured against liability to the limits of its liability as set forth in Minnesota Statutes Section 3.376.

C. Third Party Liability

Nothing herein contained is intended nor shall create any liability of any kind whatsoever to, or any rights in, any third party related to any injury or death of any person or persons or any damage to or destruction of property not otherwise existing in law.

9. MnSCU Defaults and Remedies Therefore

A. General Defaults and Remedies

1. General Events of Default

The following shall be deemed to be general events of default by MnSCU under the terms and conditions of this Agreement to which the remedies set forth in Subparagraph 2 below shall be applicable as otherwise set forth in this Agreement.

- a. MnSCU shall fail to observe or perform any of the other terms, conditions, covenants or agreements required to be observed or performed by it or any successors or assigns of MnSCU pursuant to this Agreement and such failure shall continue for a period of thirty (30) calendar days after City has, pursuant to the provisions of this Agreement, given written notice to MnSCU of such default or, in the event that such default shall be incapable of cure during said thirty (30) day period, shall have failed to commence to cure said default within thirty (30) days of the date of said notice and to diligently pursue the same to completion.
- b. MnSCU shall permit any liens on the MnSCU Property with the exception of assignments approved pursuant to the terms of this Agreement or liens contested in accordance with Article VIII above.
- c. MnSCU makes an assignment for the benefit of its creditors or admits in writing its inability to pay its debts as they become due; or an adjudication of bankruptcy or insolvency as made as to MnSCU or its business; or MnSCU files a petition of bankruptcy or files a petition seeking any reorganization, dissolution, liquidation, or rearrangement, composition, readjustment or similarly under any present or future bankruptcy or insolvency statute, law or regulation; or MnSCU files an answer admitting to or not contesting to the material allegations of a petition filed against in such proceeding or fails to have dismissed or vacated within thirty (30) days after its filing such a petition or seeks or consents or acquiesces in the appointment of any trustee, receiver or liquidator of a material part of MnSCU's properties or fails to have dismissed or vacated within thirty (30) days after the appointment without the consent or acquiescence of City of any trustee, receiver or

liquidator of any material part of MnSCU's properties.

2. General Remedies

Except as otherwise set forth in this Agreement, City shall have the following remedies in the event of a default by MnSCU:

- a. Seek and be entitled to monetary damages, including consequential damages from MnSCU for any damages, including consequential damages incurred by City as a result of MnSCU's default.
- b. Seek and be entitled to injunctive or declaratory relief as is necessary to prevent MnSCU's violation of the terms and conditions of this Agreement or to compel MnSCU's performance of its obligations hereunder.
- c. Seek such other legal or equitable relief as a court of competent jurisdiction may determine is available to City.

B. Non-Waiver

The waiver by City of any default on the part of MnSCU or the failure of City to declare default on the part of MnSCU of any of its obligations pursuant to this Agreement shall not be deemed to be a waiver of any subsequent event of default on the part of MnSCU of the same or of any other obligation of MnSCU hereunder. And, to be effective, any waiver of any default by MnSCU hereunder shall be in writing by City.

C. Remedies Cumulative

Except as specifically set forth herein, the remedies provided under this Agreement shall be deemed to be cumulative and non-exclusive and the election of one remedy shall not be deemed to be the waiver of any other remedy with regard to any occasion of default hereunder.

10. Force Majeure

Under the terms of this Agreement, neither the MnSCU nor City shall be considered in default or in breach of any of the terms with respect to the performance of their respective obligations under this Agreement in the event of enforced delay in the performance of its obligations due to unforeseeable causes beyond its control and without its fault or negligence, including but not limited to acts of God, acts of a public enemy, acts of the federal government, acts of another party, fire, floods, epidemics, strikes or embargoes, or for delays of contractors or subcontractors due to such causes. In the event of any such delay, any time for completion or delivery under this Agreement shall be extended for the period of any such delay upon written notice from the party seeking the extension to the other party.

11. Representations by MnSCU

MnSCU represents and warrants that as of the date hereof:

- A. It is a lawfully constituted agency of the State of Minnesota, acting through its Board of Trustees of the Minnesota State Colleges and Universities, it is not in material violation of any provisions of State law and that it has full power and authority to enter into this Agreement and perform its obligations hereunder.
- B. That MnSCU is fully competent to construct and maintain the Project under all

laws, rulings, regulations and ordinances of any governmental authority having jurisdiction and that it agrees to comply with all applicable State, Federal acquisition and relocation laws, wages and hours laws, including Davis-Bacon and local versions thereof or similar laws at its own expense.

- C. There are no actions, suits or proceedings pending, or to the knowledge of MnSCU, threatened against MnSCU or any MnSCU Property of MnSCU in any court or before any Federal, State, municipal or governmental agency which, if decided adversely to MnSCU, would have a material adverse effect upon MnSCU or any business or property of MnSCU and MnSCU is not in default with respect to any order of any court or government agency.
- D. MnSCU has no knowledge that any official, or employee of MnSCU is directly or indirectly financially interested in this Agreement or in any transactions concluded in connection with this Agreement.
- E. MnSCU shall do such things as are necessary to cause any information, document, certificate, statement in writing, or report required under this Agreement or otherwise delivered to any third parties under this Agreement to be true, correct and complete in all material respects.

12. City's Representations and Warranties

City represents and warrants that as of the date hereof:

- A. City is a municipal corporation under the laws of the State of Minnesota, is not in material violation of any provisions of State law and has full power and authority to enter into this Agreement and to perform its obligations hereunder.
- B. That there are no actions, suits or proceedings pending or, to the knowledge of City, threatened against City or any Property of City in any court or before any Federal, State or municipal or other governmental agency which, if decided adversely to City, could have a material adverse effect upon City or the Property, and that City is not in default of any order of any court or governmental agency.
- C. City has no knowledge that a City Council Member or other member, official, or employee of City is directly or indirectly financially interested in this Agreement or in any transactions concluded in connection with this Agreement.

13. Runs with the Land

This Agreement shall be deemed to run with the land and shall enure to the benefit of the parties hereto and to their successors and assigns.

14. Notices

Any notice, demand or other communication under this Agreement by either party to the other shall be deemed to be sufficiently given or delivered if it is dispatched by registered or certified mail, postage prepaid to:

In the case of City:

City of Duluth
City Engineer
411 West First Street
Room 211 City Hall
Duluth, MN 55802

In the case of MnSCU:

Lake Superior College
2101 Trinity Road
Duluth, MN 55811

15. Applicable Law

This Agreement together with all of its Articles, paragraphs, terms and provisions is made in the State of Minnesota and shall be construed and interpreted in accordance with the laws of the State of Minnesota.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first shown above.

Approved:

CITY OF DULUTH

By _____

Assistant City Attorney

Don Ness, Mayor

Attest:

Approved:

By _____

Jeffrey J. Cox, City Clerk

City Auditor

STATE OF MINNESOTA
LAKE SUPERIOR COLLEGE

By _____
Vice President of Finance & Administration

Date _____

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)

EXHIBIT A

Page 1 of 2

LEGAL DESCRIPTION:

A Forty (40) foot wide easement for drainage purposes over, under and across all those parts of the Lots Forty-seven (47) thru Fifty-one (51), Block Three (3), all of Block Four (4) and Lots One (1) and Two (2), Block Five (5), WILLARD AND PIPERS DIVISION together with that part of the Southeast Quarter of the Southwest Quarter (SE1/4 of SW1/4); all in Section Twenty-nine (29), Township Fifty (50) North, Range Fourteen (14) West of the Fourth (4th) Principal Meridian, City of Duluth, St. Louis County, Minnesota, being centered on the following described line:

Commencing at the Northwest Corner of WILLARD AND PIPERS DIVISION; thence South 89 degrees 31 minutes 08 seconds East along the north line of said WILLARD AND PIPERS DIVISION, a distance of 14.95 feet to the point of beginning of the centerline to be described; thence South 08 degrees 47 minutes 02 seconds East, a distance of 291.72 feet; thence South 29 degrees 00 minutes 14 seconds East, a distance of 35.91 feet; thence South 37 degrees 13 minutes 55 seconds West, a distance of 40.61 feet; thence South 44 degrees 13 minutes 58 seconds West, a distance of 22.46 feet; thence South 34 degrees 06 minutes 49 seconds West, a distance of 26.75 feet; thence South 22 degrees 36 minutes 22 seconds West, a distance of 32.30 feet; thence South 20 degrees 37 minutes 03 seconds West, a distance of 37.77 feet; thence South 17 degrees 54 minutes 52 seconds West, a distance of 87.07 feet and said centerline there terminating.

I hereby certify that this survey, plan, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the state of Minnesota.

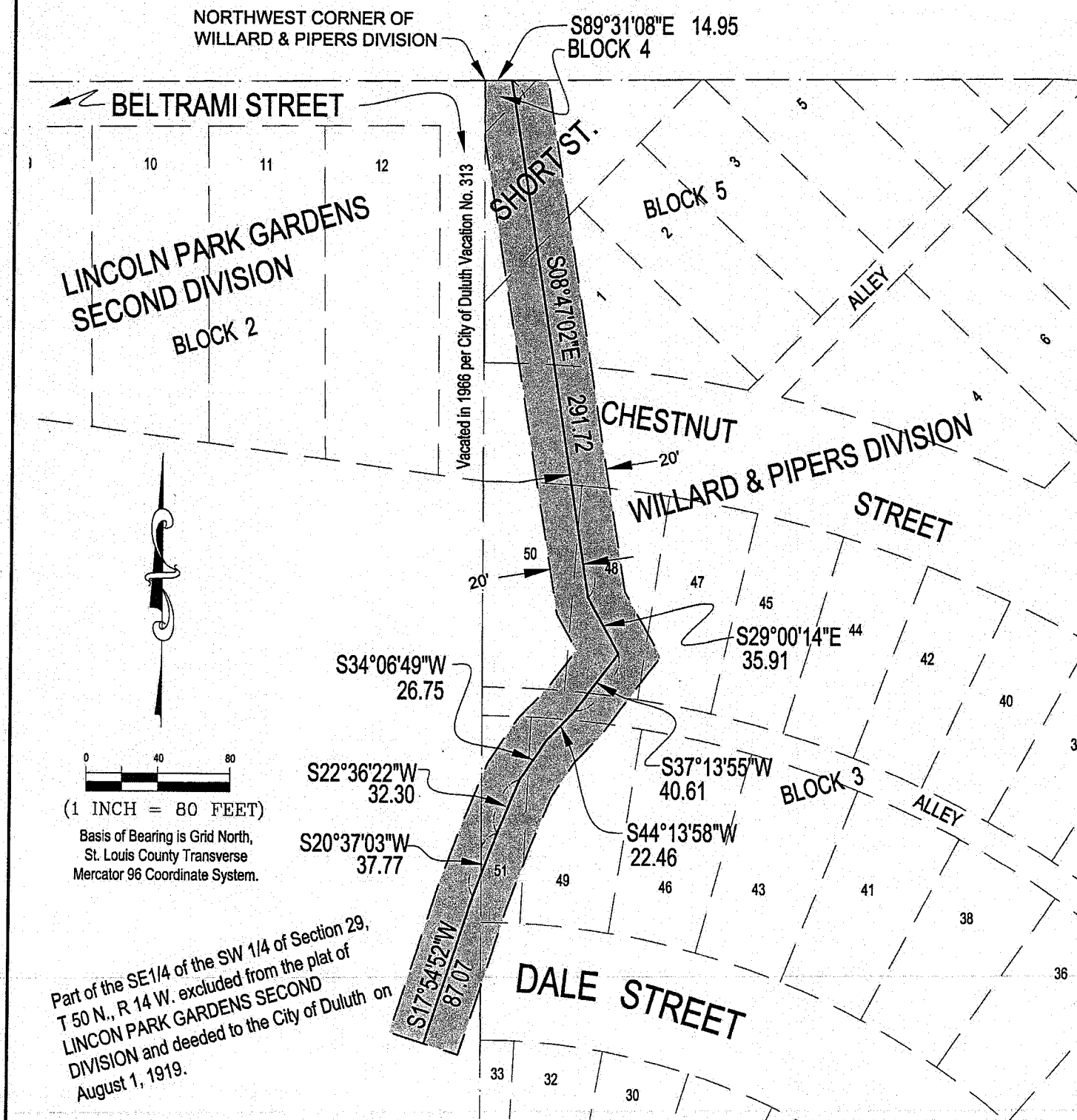
Paul A. Vogel

Signed

Date 7/6/2010 License No. 44075

EXHIBIT A

Page 2 of 2
DRAINAGE EASEMENT



(1 INCH = 80 FEET)

Basis of Bearing is Grid North,
St. Louis County Transverse
Mercator 96 Coordinate System.

Part of the SE1/4 of the SW 1/4 of Section 29,
T 50 N., R 14 W. excluded from the plat of
LINCOLN PARK GARDENS SECOND
DIVISION and deeded to the City of Duluth on
August 1, 1919.

I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State of Minnesota.

Print Name: Paul A. Vogel

License # 44075

Signature: 

Date: 07/06/2010

DATE PREPARED: 7/06/10

PROJ NO: 100333

FILE: 100333 cBase

SHEET 1 of 1 SHEETS

DULUTH

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Duluth, MN 55802

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<http://www.LHBcorp.com>

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250 Third Avenue North
Suite 450
Minneapolis, MN 55401

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FAX 612/338-2088

